MOHAMMAD IDRES MOHD SULAIMAN SHAH

v.

MALAYAN BANKING BHD

HIGH COURT MALAYA, KOTA BHARU
MUHAMMAD KAMIL AWANG J
[BANKRUPTCY NO: 29-810-1997]
5 SEPTEMBER 2000

BANKRUPTCY: *Practice and procedure - Application challenging bankruptcy notice and petition - Whether filing of application less than 3-day limit before petition to be heard contravened r. 117 Bankruptcy Rules 1969 - Whether exchange of affidavits before filing thereof precluded respondent from raising irregularity*

The appellant filed an application against the respondent challenging the bankruptcy notice and petition served on him. The respondent filed a preliminary objection ('PO') under s. 3(2) of the Bankruptcy Act 1967 and r. 117 of the Bankruptcy Rules 1969 to dismiss the appellant's application. At the hearing on 26 June 2000, the deputy registrar upheld the objection on the ground that the appellant's application was filed less than the three-day limit before the petition was to be heard as prescribed by r. 117 of the said rules. Meanwhile the appellant filed the notice in Form 16 as required under r. 117, and after a series of postponement, the petition was finally fixed for hearing on 10 September 2000. The appellant now appealed against the decision of the deputy registrar.

Held:

[1] The appellant took a strong objection to the respondent's PO raised without notice at this appeal. On that point alone, the court was not bound to hear the respondent's objection.

[2] Assuming that the PO was in order, the notice in Form 16 as required under r. 117 was filed on 26 June 2000 and the petition was fixed for hearing on 10 September 2000. Therefore, r. 117 was satisfied.

[3] Even if the appellant's application was filed together with Form 16 on 26 June 2000, the PO would be unsustainable. That was because when the appellant filed the application there were already exchanges of affidavits regarding the subject matter and by these actions the respondent

had clearly indicated that it had waived its right to raise the objection. So when the respondent filed the PO, it was precluded by the doctrine of waiver from raising the irregularity as it could not approbate and reprobate at the same time.

[Appeal allowed with costs.]

Case(s) referred to:
Binariang Communication Sdn Bhd v. I & P Inderawasih Jaya Sdn Bhd [2000] 3 CLJ 789 ***(foll)***
Crane v. Colonial Mutual Fire Insurance [1920] 1 CLR 305 ***(refd)***
Development & Commercial Bank Bhd v. Datuk Kian Seng [1995] 3 CLJ 307 ***(refd)***
Earl Of Darnley v. (Proprietors) Of London, Chatham & Dover Railway [1867] LR 2HL 43 ***(refd)***
Pilcher v. Rawlins [1872] 2 Ch App 256 ***(refd)***
Tan Ah Chim & Sdn Bhd v. Ooi Bee Tat [1993] 4 CLJ 476 ***(refd)***
WJ Alan Co Ltd v. El Nasr Export & Import Co [1972] 2 All ER 127 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(2)
Bankruptcy Rules 1969, r. 117

For the appellant - P Dorairaj; M/s P Dorairaj & Co
For the respondent - Wan Mohd Zuhdi Wan Abdullah; M/s Rithaudeen & Aziz

Reported by Usha Thiagarajah

JUDGMENT

Muhammad Kamil Awang J:

This is an appeal against the decision of the learned Deputy Registrar in upholding the respondent's preliminary objection under s. 3(2) of the Bankruptcy Act 1967 and r. 117 of the Rules thereunder, raised by the respondent at the hearing on 17 July 2000.

The judgment creditor (the respondent) gave a loan of RM96,000 to the appellant's wife (the chargee) to enable her to purchase a piece of land and build a house thereon. The land was charged to the respondent as security for the loan, and the appellant stood as a guarantor thereto. The chargee defaulted in her payment, the respondent bank foreclosed, and sold the land (by public auction) for RM41,500 on 13 January 1993. Later on 5 July 1994 the respondent obtained a judgment in a sum of RM157,870.75 against the chargee, and thereafter she was adjudged a bankrupt on 14 May 1997.

Later a bankruptcy notice (encl. 1) had been served upon the appellant on 13 December 1997, followed by a bankruptcy petition (encl 3) dated 12 May 1998, about six months later. The appellant, being an illiterate person obtained

the services of a counsel, who filed a summons-in-chambers dated 23 May 1998 (encl. 9) challenging the bankruptcy notice and the petition on the ground that the proceeds from the sale of land, had not been accounted for; and therefore the judgment debt had not been quantified at the time of the service of the bankruptcy notice on him. There was an exchange of affidavits between the parties and finally the appellant filed this summons against the respondent. On 20 March 2000 the respondent filed a preliminary objection under s. 3(2) of the Act and r. 117 of the Rules to dismiss the appellant's application (encl. 9).

At the hearing on 26 June 2000, the Deputy Registrar upheld the objection on the ground that the summons in chambers was filed less than the three days limit as prescribed by r. 117.

Meanwhile, the appellant had, on 26 June 2000, filed the notice on Form 16 as required under r. 117, which, after a series of postponement in the requests of both sides, was finally fixed for hearing on 10 September 2000. These facts are not disputed.

Learned counsel for the appellant submitted that as there was no indication by the respondent that it would raise a preliminary objection under s. 3(2) and r. 117 earlier, the appellant was taken by surprise by that application. The respondent was deemed to have waived its right from the beginning, and therefore he was precluded from raising it now.

In a very recent Court of Appeal case of *Binariang Communication Sdn Bhd v. I & P Inderawasih Jaya Sdn Bhd* [2000] 3 CLJ 789, the court held that:

> For starters, we need to point out that the procedural point was never argued in the court below and on this omission alone, an appellate court is not bound to hear the appellant on their objection, unless due notice had been given and the respondent placed no strong objection to it being raised for the first time.

In the instant case, the appellant took a strong objection to the respondent's preliminary objection raised without notice at this appeal. On this point alone the court was not bound to hear the respondent's objection.

Assuming that the preliminary objection is in order, r. 117 of the Bankruptcy Rules 1969 prescribed the time limit for filing a notice. Rule 117 states:

> Where a debtor intends to show cause against a petitioner he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known, a copy of the notice 3 days before the day on which the petition is to be heard.

The notice that is required under r. 117, is a notice in Form 16. This provision is mandatory and therefore a failure to abide by the rule cannot be taken as a mere irregularity that can be cured. See *Development & Commercial Bank Bhd v. Datuk Kian Seng @ Ong Kim Cheang* [1995] 3 CLJ 307 (FC).

It is clear that the notice in Form 16 was filed on 26 June 2000 and the petition was fixed for hearing on 10 September 2000, therefore it satisfies r. 117. I do not think it is correct to say that the summons-in-chambers (encl. 9) simpliciter, (without Form 16), constitutes a notice within the meaning of r. 117.

Even if the summons were filed together with Form 16 on 26 June 2000, the preliminary objection of the respondent would be unsustainable. The learned counsel for the appellant was correct that the respondent had waived its right. It is inequitable for the respondent to insist on its right when at the first instant the respondent had acted, by the exchange of affidavits with the appellant in a manner which indicated that he had waived his right.

The doctrine of waiver as enunciated by Lord Denning in *WJ Alan Co Ltd v. El Nasr Export & Import Co* [1972] 2 All ER 127 is as follows:

> The principle of waiver is simple as this: if one party, by his conduct, leads another to believe that the strict rights under the contract, will not be insisted on, intending that the other party should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so.
>
> See *Plasticmoda Societa Per Azioni v. Davidson (M) Ltd* [1952] 1 Lloyd's Rep. 527.
>
> There may be no consideration moving from him who benefits by the waiver. There may be no detrimental to him acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insists on them. His rights are at any rate suspended as long as the waiver lasts. He may on occassion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them. See *Tool Metal Manufacturing Co. Ltd v. Tunsten Electric* [1955] 2 All ER 157. But there are cases where one withdraw; or it cannot be done without injustice to the other party. In that he is bound by that waiver. He will not be allowed to his strict right. He can only enforce them subject to the waiver he has made.

See *Tan Ah Chim & Sdn Bhd v. Ooi Bee Tat* [1993] 4 CLJ 476.

In *Crane v. Colonial Mutual Fire Insurance* [1920] 1 CLR 305, the court held that -

> ... We are bound here to limit the word "waiver"to its own legal connotation. A waiver must be international act with knowledge"- per Lord Chelmsford L.C.

In *Earl Of Darnley v. (Proprietors) Of London, Chatham & Dover Railway* [1867] LR 2HL 43 it was stated thus:

> First, "some distinct act ought to be done to constitute a waiver" – per Parke B. in *Doe d. Nash v. Birch* [1836] 1 M & W 402 at p. 406, and – per William J in *Perry v. Davis* [1858] 3 CB NS 769, next it must be 'intentional', that is, such either expressly or by imputation of law indicates intention to treat the mailer as if the condition did not exist or as if the forfeiture or breach of condition had not occurred, lastly it must be 'with knowledge', an essential supported by many authorities, from *Pennent*'s case [1596] 2 Co. Rep 171 at p. 173 and down to *Mathews v. Smallwood* [1910] 1 Ch 777.

James LJ in *Pilcher v. Rawlins* [1872] 2 Ch App 256 said (at p. 268):

> 'Waiver' is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions. It is a conclusion of the law when the necessary facts are established. It looks however, chiefly to the conduct and the position of the person who is said to have waived, in order to see whether he has 'approached so as to prevent reprobating.' – in English terms, whether he has elected to get some advantage to which he should not otherwise have entitled, so as to deny him a later election to the contrary (see Lord Shah in *Pitman v. Crum Ewing* [1911] AC 217 at p. 239. His knowledge is necessary or he cannot be said to have approbated or elected.

In the instant case, when the appellant filed the summons-in-chambers there were exchanges of affidavits regarding the subject matter, and by these actions the respondent had clearly indicated that it had waived its right to raise an objection. It was intentional or within its knowledge that it had waived its knowledge. The appellant had believed and acted in the knowledge that the respondent had by its conduct waived its rights. So when the respondent filed its preliminary objection, it was precluded by the doctrine of waiver – as it cannot approbate and reprobate at the same time.

Thus the appellant's Form 16 does not offend r. 117 nor s. 3(2) of the Act. In the circumstances, I would allow the appeal with costs to the appellant.